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Re: Villages at Vigneto Proposed Development and Whetstone Ranch 404 permit

Dear Mr. Miller, Chief Diebolt, Chief Brush, and Mr. Richardson:

Please accept this request for the Army Corps of Engineers to revoke the 404 permit for the “Whetstone Ranch” (original proposed development) and the “Villages at Vigneto” (new proposed development) on behalf of Sierra Club’s Grand Canyon (Arizona) Chapter and the Center for Biological Diversity.

Sierra Club is one of the oldest grassroots environmental organizations in the country. Sierra Club’s mission is “to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth’s ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.” Sierra Club has more than 2.4 million members and supporters nationwide and 35,000 in Arizona. Our chapter has long advocated for protection of the San Pedro River and our members enjoy hiking, backpacking, camping, and wildlife viewing, among other activities along this critical river. To date, our members and supports have submitted more than 700 comments seeking revocation of the permit for the proposed Vigneto development.

The Center for Biological Diversity (“Center”) is a non-profit, public interest, conservation organization with more than 900,000 members and online activists dedicated to the protection of endangered species and wild places and to the fulfillment of the continuing educational goals of our membership and the general public in the process. We have been intimately involved in San Pedro River advocacy for three decades.

Background

The proposed development, Villages at Vigneto (“Vigneto”), is a large development on more than 12,000 acres proposed by El Dorado Benson, LLC (“El Dorado”). According to El Dorado’s chairman, Mike Ingram, it is a development “inspired by the Tuscany hill country.”¹ This development would include 27,760 new homes, commercial developments, golf courses and parks, vineyards and orchards, resorts, and an extensive road and utility network. Vigneto could potentially have as many as 70,000 new residents, increasing the population of Benson – currently at 5,100 – dramatically.

Vigneto is located near the Coronado National Forest at the base of the Whetstone Mountains, and near the ecologically significant San Pedro River and other important natural areas, such as Kartchner Caverns State Park. It is near the Lower San Pedro River Global Important Bird Area and the San Pedro Riparian National Conservation Area. Downstream from the proposed Vigneto development are important riparian mitigation properties on the San Pedro River. All of these significant conservation areas require good quality water and sufficient water to sustain them.

Request for Revocation of Section 404 permit for Whetstone Ranch

We are writing to formally request that the Army Corps of Engineers (ACE) revoke the Clean Water Act (CWA) Section 404 permit for Whetstone Ranch issued to Whetstone Partners LLC/LLP (Permit #2003-00826-SDM). We have evaluated this permit and it is quite clear that the analysis performed prior to granting the permit was incomplete and today is outdated as the proposed Vigneto development is much larger and will have a much greater impact on the San Pedro River. Further, it appears that objections and instructions from the Environmental Protection Agency (EPA) were not addressed prior to the issuance of the 2006 permit and there was no consultation with the United States Fish & Wildlife Service (USFWS) to evaluate impacts to species listed pursuant to the federal Endangered Species Act (ESA).

Regulations Governing Revocation of Section 404 permits

The ACE must consider revoking this permit and the regulations governing Section 404 permits state the following:

Modification, suspension, or revocation of permits. (a) General. The district engineer may reevaluate the circumstances and conditions of any permit, including regional permits, either on his own motion, at the request of the permittee, or a third party, or as the result of periodic progress inspections, and initiate action to modify, suspend, or revoke a permit as may be made necessary by considerations of the public interest. In the case of regional permits, this

¹Development would make Benson 8 times bigger, Arizona Daily Star, April 4, 2015
http://tucson.com/news/local/development-would-make-benson-times-bigger/article_4c5445db-2d91-578c-a23a-37d2b31b670e.html

reevaluation may cover individual activities, categories of activities, or geographic areas. Among the factors to be considered are the extent of the permittee's compliance with the terms and conditions of the permit; whether or not circumstances relating to the authorized activity have changed since the permit was issued or extended, and the continuing adequacy of or need for the permit conditions; any significant objections to the authorized activity which were not earlier considered; revisions to applicable statutory and/or regulatory authorities; and the extent to which modification, suspension, or other action would adversely affect plans, investments and actions the permittee has reasonably made or taken in reliance on the permit. Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with §325.2 of this part, and not as modifications under this section. 33 C.F.R. § 325.7(a)

Sierra Club and the Center for Biological Diversity are third parties requesting that the ACE revoke the permit based on changed circumstances and conditions of the Whetstone Ranch 404 permit, and the fact that relevant information and concerns from EPA were not considered, and that there was no consultation with USFWS pursuant to Section 7 of the ESA.

Reasons for Revocation Request

There was no consultation with the USFWS pursuant to the federal ESA. Since the original permit was issued, critical habitat for endangered jaguars was finalized (2014), and critical habitat for the western yellow-billed cuckoo has been proposed (2015) by the USFWS.

Whetstone Critical Habitat Unit 4a for jaguar overlaps with Vigneto's southwestern boundary and therefore impacts the jaguar habitat. There is proposed critical habitat for the western yellow-billed cuckoo along the San Pedro River both upstream and downstream from Vigneto. Also, subsequent to issuance of the original permit, critical habitat for the southwestern willow flycatcher (2013) and Mexican spotted owl (2001) was designated and should be considered.

The issuance of a 404 permit authorizing impacts to waters of the U.S. constitutes a federal action and triggers consultation with the USFWS under Section 7 of the ESA. To date, we have seen no indication that any consultation has been initiated regarding the potential impacts of the development to threatened and endangered species.

There was no consideration or consultation with the U.S. Bureau of Land Management regarding the impacts of the proposed development on Federal Reserved Water Rights for the San Pedro River.

Federal Reserved Water Rights for the San Pedro River are protected by Federal law and by Arizona Supreme Court Order. Surface water and groundwater in the area are connected significantly and groundwater pumping associated with Vigneto will have impact on the river and might negatively affect Federal Reserved Water Rights. The ACE should acknowledge and consider individual and cumulative impacts upon the San Pedro River and the Federal Reserve Water Rights upon which it depends and consult with BLM on these impacts.

The concerns raised by EPA in a June 14, 2004 letter to the ACE were not addressed prior to issuance of the original permit. That letter clearly outlined major impacts from the much smaller

Whetstone Ranch development and detailed that they are significant and potentially un-mitigatable. The letter stated:

Based on our review of the available information, we have determined the proposed project is a candidate for elevation pursuant to the 1992 Memorandum of Agreement between the Environmental Protection Agency (EPA) and the Department of the Army per CWA Section 404q. We respectfully object to the issuance of a permit for the proposed project because the authorization **may result** in substantial and unacceptable impacts to aquatic resources of national importance (ARNIs).

The letter went on to illustrate the impacts:

The project site is a relatively undisturbed desert grassland environment, characterized by a dense network of 475 acres of braided ephemeral streams directly tributary to the San Pedro River. The proposed project would eliminate 51 acres of these waters via direct discharges of fill material, a significant amount of jurisdictional waters. Spread broadly across the site in over 350 locations, the proposed 51 acres of discharges would severely fragment the remaining “avoided” waters and degrade ecosystem processes and functions. In addition to surface hydrological and biological functions, the project is likely to affect groundwater resources at the San Pedro River already exhibiting declining water levels due to groundwater pumping. The increase in groundwater pumping required to serve Whetstone Ranch, combined with the removal of 51 acres of tributary waters, may exacerbate this degradation. The project will also substantially reduce capacity of aquatic and terrestrial organisms to enter and leave riverine waters of the U.S. through large, continuous patches of intact habitat. The proposed project site is presently composed of, and surrounded for several miles by, a functioning desert mosaic of native plant communities. Development of this site will disrupt food webs and destroy migration networks which, on the landscape scale, are difficult or impossible to mitigate.

It appears that the conditions for the Section 404 permit issued to Whetstone Partners LLC/LLP in 2006 (Permit #2003-00826-SDM) may not have been met. The permit required yearly reports with updated exhibits for comparison and compliance purposes, showing current Drainage Corridor Impact Areas, Temporary Utility Grading Impact Areas, Roadway Grading Impact Areas, and Pad Grading Impact Areas. Were these ever filed? Please provide the reports or confirm that they were not filed.

The information provided at the time the permit was issued was incomplete and significant new information has surfaced that could not have been adequately considered at the time of the original public interest decision. Vigneto at 27,760 new housing units on 12,324 acres is a new, different, and much larger proposed development from Whetstone Ranch, which consisted of up to 20,000 new housing units on 8,200 acres. The original permit analysis did not include the additional 4,124 acres proposed for development located west of State Route 90 and adjacent to the Whetstone Mountains.

Impacts to, and the amount of discharge into, jurisdictional waters from this new development will be greater and significantly different than what was permitted in 2006 and represent significant changed circumstances that also warrant revocation of this inadequate, incomplete, and outdated section 404 permit..

A full Environmental Impact Statement must be conducted to disclose and analyze direct, indirect and cumulative impacts to the human environment.

Due to the significant and widespread impact and controversy as well as the significant changes associated with this proposed development, Sierra Club and the Center for Biological Diversity ask the ACE to prepare an Environmental Impact Statement (EIS). The National Environmental Policy Act (NEPA) requires federal agencies to prepare a detailed EIS for all major Federal actions significantly affecting the quality of the human environment (42 U.S.C. § 4332[2][C]). If an agency decides not to prepare an EIS, it must supply a “convincing statement of reasons” to explain why the project’s impacts will be insignificant; “[t]he statement of reasons is critical to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project” (*Blue Mountains Biodiversity Project*, 161 F.3d at 1212).

In considering whether an EIS is required for a proposed action, the Council on Environmental Quality regulations direct agencies to consider ten “significance factors” (40 C.F.R. § 1508.27[b]; *Sierra Club v. Bosworth*, 2007 U.S. App. LEXIS 28013 [9th Cir. 2007]). “[Any] of these factors may be sufficient to require preparation of an EIS in appropriate circumstances” (*National Parks and Conservation Assoc. v. Babbitt*, 241 F.3d 722, 731 [9th Cir. 2001]).

The criteria for determining when an EIS is required include these: “unique characteristics of the geographic area such as proximity to historic or cultural resources, parklands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas”; “whether the action is related to other actions with individually insignificant but cumulatively significant impacts”; “the degree to which the action may adversely affect an endangered...species”; and “whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment” (40 C.F.R. §§ 1508.27[b][3], [7], [9], [10]). An EIS is also required when impacts are “highly controversial,” i.e., implicate “a substantial dispute [about] the size, nature, or effect of” the agency’s actions – or otherwise implicate “highly uncertain” or “unknown risks” (40 C.F.R. 1508.27[b][4], [5]; *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 [9th Cir. 1998]). Agencies must also consider “context” and, thus, whether impacts are significant relative to the affected region, interests, or locality and in light of both short- and long-term effects. An action could raise concerns about purely local resources or purely short-term effects but nonetheless require preparation of an EIS. It is clear that this proposed action triggers an EIS on several of these counts. If approved, this proposal would be a major Federal action and triggers the need for an EIS based on the unique characteristics of this area and the multitude of natural areas it affects, the threatened, endangered, and sensitive species the area contains, including up-stream and down-stream on the San Pedro River; and the significance of this proposed actions; and the highly controversial nature of this issue and the need for a thorough cumulative impacts analysis.

Any one of these criteria can compel preparation of an EIS if it raises substantial questions about whether project may cause significant degradation of some human environmental factor (*NPCA v. Babbitt*, 241 F.3d 722, 731 [9th Cir. 2001]; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 [9th Cir. 1998]). It is up to the agency – in this case the Army Corps of Engineers – to provide a convincing statement of reasons justifying a decision to rely on a lesser Environmental Assessment (EA) and not an EIS (*Idaho Sporting Congress*, 137 F.3d at 1150).

NEPA emphasizes “coherent and comprehensive up-front environmental analysis” to ensure an agency “will not act on incomplete information, only to regret its decision after it is too late to correct” (*Blue*

Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1216 [9th Cir. 1998]). NEPA thus requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed action (42 U.S.C. § 4332[C]; 40 C.F.R. §§ 1508.7, 1508.8, 1508.25 [the scope of a proposed action must include connected, cumulative, and similar actions]; *Sierra Club v. Bosworth*, 2007 U.S. App. LEXIS 28013 [9th Cir. 2007]). Cumulative impacts include the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time (40 C.F.R. § 1508.7). A cumulative effects analysis must also provide detailed and quantifiable information and cannot rely on general statements and conclusions (*Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1380 [9th Cir. 1998]).

As noted above, impacts to, and the amount of discharge into, jurisdictional waters from this new development will be significantly different than what was permitted in 2006 and therefore represent significant changed circumstances that should trigger an EIS. The EIS should fully consider important new information that has become available since the permit was issued in 2006, and the ACE should require that an EIS and the public process associated with it be conducted. Just the fact that this proposed Vigneto development is 50 percent larger than the proposed Whetstone Ranch development should be enough to trigger and warrant an EIS. In addition, the proposed design of Vigneto will have more impact as it includes several “loop roads” (See maps on pages 17 and 26 of Vigneto’s CMP), which frequently have much more significant and cumulative impacts than do linear access roads.

Summary

The ACE should revoke the CWA Section 404 permit for Whetstone Ranch issued to Whetstone Partners LLC/LLP (Permit #2003-00826-SDM, later transferred to El Dorado Benson, LLC) due to the significantly changed circumstances, the failure to consider significant and relevant information, the failure to consult with USFWS or address concerns raised by EPA, and significant and un-mitigatable impacts of the project. Any further actions on this proposed development warrant a full EIS.

Note that we utilized the detailed analysis performed by Tucson Audubon Society and materials they obtained in drafting this request. We also refer you to the TAS letter dated May 19, 2015 for additional background on why this permit should be revoked.

Thank you for considering our concerns.

Sincerely



Sandy Bahr
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Sierra Club – Grand Canyon Chapter



Robin Silver, M.D.
Co-founder and Board Member
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